IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

SUMMONS FOR JUDGMENT NO.208 OF 2006

IN

SUIT NO.82 OF 2006

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M/s.amg International GmbH ...Plaintiff

v/s.

Mr.Faisal Kapadi ...Defendant

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Mr.Niranjan Pandit with Mr.Raju Gawde i/b Joy Legal Consultants for the Plaintiff.

Mr.H. Nikumb for the Defendant.

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CORAM: D.K.DESHMUKH, J.

DATED: 12TH SEPTEMBER,2006

P.C.:

1. There is no dispute between the parties that the amount which is claimed by the Plaintiff from the Defendant is the price of the goods supplied by the Plaintiff to the Defendant and that the amount is unpaid by the Defendant.

2. The defence of the Defendant is that the Plaintiff had appointed the Defendant as sole-distributor of their goods, but subsequently the Plaintiff appointed some other party as distributor and thus the Plaintiff committed breach of the contract. Second defence is that the Plaintiff had agreed to take back the unsold goods, but the Plaintiff has not taken back the unsold goods.

3. So far as the first defence is concerned, it is not relevant, because if the Plaintiff has committed

breach of the contract by appointing somebody else as the distributor and because of that the Defendant has suffered any loss, the remedy of the Defendant is to file a suit for recovery of damages. The Defendant cannot withhold unpaid price of the goods.

4. So far as the second defence is concerned, the Plaintiff by letter dated 22-12-2004 made following offer to the Defendant,

> "Please send for check the goods being still in stock together with their Lot-numbers. We can offer already today that you will receive a corresponding credit note for all products in perfect condition.
>
> The remaining sum after deduction of the credit note is payable by return."

5. There is no dispute that this letter was received by the Defendant. The Defendant has not been able to show as to how the Defendant responded to this offer. The correspondence placed on record shows that there was no response from the Defendant to the offer made by the Plaintiff. The Plaintiff, therefore,

addressed a notice dated 10-2-2005 demanding the amount. In that letter, reference was made to the letter dated 22-12-2004. The Defendant replied to the letter dated 10-2-2005 by letter dated 15-2-2005. So far as the communication from the Plaintiff to the Defendant dated 22-12-2004 is concerned, that is referred to in paragraph (2) of this letter. In paragraph (2) the Defendant states thus:

> "Regarding settling of payments we ourselves in our fax dated 22/12/04 have asked AMG to take back all the un-sold goods & pay us the balance after deducting their amount. AMG in their reply of 22/12/04 have agreed for the same after inspection."

6. It is, thus, clear that till February, 2005 the Plaintiff was demanding that the unsold goods should be returned to the Plaintiff. The Defendant admits that he had received that offer from the Plaintiff, but there was no response from the Defendant. By letter dated 2nd March, 2005 again the Plaintiff said that they are willing to take back the goods provided they are in good condition with a shelf life of atleast 12 months against a Credit Note which offer

is still valid. In their reply dated 22-3-2005 the Defendant stated that the condition that the returned goods should have shelf life of atleast 12 months is not valid. That position is explained by the Plaintiff by letter dated 20th April, 2005. Ultimately by letter dated 12-7-2005 the Defendant communicated to the Plaintiff the list of materials with lot numbers, which they were to return. By that letter they asked the Plaintiff to send their representative for examination of the goods. The correspondence thus shows that the Plaintiff at all cannot be blamed in this regard. The Plaintiff had asked the Defendant to return the goods. At no point of time the Defendant has offered to return the goods. Even when the lot numbers were communicated by letter dated 12-7-2005, the Defendant did not agree to return the goods, instead they wanted the Plaintiff to send their representative for examination of the goods. Had the Defendant been really in possession of the goods, and the goods were unsold and the Defendant was not in possession to sell those goods because of termination of the distributorship, the Defendant as any ordinary prudent man would have accepted the offer made by the Plaintiff by letter dated 22-12-2004 promptly and

returned the goods. The conduct of the Defendant shows that in fact the Defendant had sold the goods and is taking up these defences merely to avoid making payment for the same.

7. Defences put up by the Defendant thus have no substance. Summons for judgment is, therefore, granted. The suit is decreed in terms of prayer clauses of the suit. Refund of court fees as per rules.

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